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Square Pegs, Round Hole: The Fourth Amendment and Preflight Searches of Airline Passengers in a Post-9/11 World

I. INTRODUCTION

September 11, 2001 marked a day of tragedy on which thousands of people lost their lives. As a result, the dangers of hijacking became a heightened subject of concern for America. The detection and detention of would-be hijackers is now a greater priority than in prior times, and the government has implemented many new measures—such as increased security at airports—to accomplish this goal.¹ However, these increased security measures,²

1. The Federal Aviation Administration (FAA) began requiring airline carriers to conduct screenings of all passengers and inspections of all carry-on items beginning in 1973. 5 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 10.6(a), at 280–81 (2004). Security measures in airports increased beginning with the Aviation Transportation Security Act (ATSA) enacted by Congress on November 19, 2001 as a response to the tragic events of 9/11. *Id.* at 281–82. Therein, Congress federalized the inspection process and created the Transportation Security Administration (TSA), charging it with responsibility for “security in all modes of transportation,” including airlines and other modes. *Id.* at 282; 49 U.S.C.A. § 114(d) (West 2004). In an attempt to detect previously permitted objects like the small knives and box cutters carried on board and used as weapons by the 9/11 hijackers, the ATSA set forth new, “considerably more intrusive and intensive [screening procedures] than those earlier mandated by the FAA.” 5 LAFAVE, *supra*, at 281–82 (citing Andrew Hessick, *The Federalization of Airport Security: Privacy Implications*, 24 WHITTIER L. REV. 43, 43 (2002)). These procedures included examination of checked baggage for explosives through the use of dog sniffs, bomb-scan machines, and manual searches; closer inspection of passengers; and possible searches of carry-on bags at boarding gates, all in addition to searches performed at the primary security checkpoint. *Id.* at 282 (citing Hessick, *supra*, at 52; Brett Andrew Slean, Comment, *The Fourth Amendment and the New Face of Terrorism: How September 11th Could Change the Way America Flies*, 22 N. ILL. U. L. REV. 567, 585 (2002)).

2. Additional security procedures or technologies currently used in preflight searches or that foreseeably may be used include biological/chemical detectors, TRANSP. SEC. ADMIN., *OUR SECURITY STRATEGY* 1 (2006), http://www.tsa.gov/approach/layered_strategy.shtm; trace portals or “puffers,” which expel strong puffs of air onto passengers’ bodies in order to dislodge and then analyze trace particles for explosives contents, TRANSP. SEC. ADMIN., *supra*, <http://www.tsa.gov/approach/tech/puffers.shtm>; biometrics, including fingerprint identification and retinal scans, TRANSP. SEC. ADMIN., *supra*, <http://www.tsa.gov/approach/tech/biometrics.shtm>; millimeter wave and X-ray backscatter technologies, which would enable inspections officials to see through passengers’ clothing to detect weapons, *see* Marilyn Adams, *Most Flyers Accept Intrusion in the Name of Security*, USA TODAY, Sept. 6, 2006, http://www.usatoday.com/money/biztravel/2006-09-06-accepting-intrusions_x.htm;

often in the form of precautionary, suspicionless searches made without warrants, lead to a hard question regarding personal privacy and the right to travel. Are these preflight passenger searches constitutional under the Fourth Amendment?³

This Comment shows that a new Fourth Amendment approach is necessary to justify warrantless preflight searches of passengers boarding airliners because the prevailing approach is based on the misapplication of a set of exceptions to the Warrant Clause in the Fourth Amendment.⁴ Part II outlines how the history culminating in the adoption of the Fourth Amendment shows the need for judicial review of government search decisions and that a warrant-preference standard should be applied in determining which searches and seizures are constitutional under the Amendment. Part III discusses how courts have misapplied exceptions to the warrant requirement—including the stop-and-frisk exception, the consent exception, the *Katz* privacy balancing test, and the border search exception—in attempts to justify preflight passenger searches, and explains why these attempts ultimately fail. Part IV calls for the creation of a sui generis exception to the Warrant Clause in the Fourth Amendment that resolves the irrationality and inconsistency in the courts' current justification of the searches. In addition to creating a rational justification for the searches, this approach would allow security in airline travel while being narrowly tailored to ensure that searches necessary to public safety are not misapplied to other situations in conflict with individual constitutional rights.

Jonathan Duffy, *The Future of Airport Security*, BBC NEWS ONLINE, <http://news.bbc.co.uk/1/hi/magazine/3263343.stm> (last visited October 18, 2006); and thermal imaging, *see id.*

3. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

4. Other commentators have also concluded that the presently existing exceptions to the warrant requirement do not justify preflight or mass transit searches. *See generally The Constitutionality of Airport Searches*, 72 MICH. L. REV. 128 (1973) [hereinafter *Airport Searches*]; Charles J. Keeley III, Note, *Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers To Prevent Terrorism?*, 74 FORDHAM L. REV. 3231 (2006).

II. JUDICIAL REVIEW AND THE FOURTH AMENDMENT

The language of the Fourth Amendment to the Constitution is inherently ambiguous.⁵ While the Amendment specifically forbids “unreasonable searches and seizures,”⁶ it outlines parameters for proper search warrants but does not specifically describe when such warrants are required. As a result, some authorities have argued that a warrant-preference standard is not required by the Fourth Amendment and that only a general reasonableness standard is required to determine the constitutionality of searches and seizures.⁷ However, this Part will outline how the history culminating in the Fourth Amendment demonstrates the importance of judicial review of searches by law enforcement officials—and consequently a warrant-preference standard—in the Amendment.

5. 1 LAFAVE, *supra* note 1, § 1.1(a), at 8 (“The Fourth Amendment, it has been aptly noted, has ‘both the virtue of brevity and the vice of ambiguity.’ It does not define the critical word ‘unreasonable,’ nor does it indicate what the relationship is between that part prohibiting unreasonable searches and that part setting forth the conditions under which warrants may issue.” (citations omitted) (quoting J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 42 (1966))).

6. U.S. CONST. amend. IV.

7. Although the general reasonableness standard has gained increasing acceptance, Professor Thomas Y. Davies argues that while neither the reasonableness nor the warrant-preference construction “adheres to the historical meaning” of the clause, “the warrant-preference construction is more faithful to the Framers’ concerns than the generalized-reasonableness construction. In fact, the latter is nearly the antithesis of the Framers’ understanding.” Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 550 (1999). Either way, “the Supreme Court has not cleared the deck of many of its rulings from the earlier era.” JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 191–92 (2002). Thus, Fourth Amendment jurisprudence today reflects both the “warrant requirement and exceptions” paradigm and the reasonableness paradigm, leading to rulings such as those concerning preflight searches, which often feature the reasoning of and tension between both paradigms. *See, e.g.*, *Shapiro v. State*, 390 So. 2d 344 (Fla. 1980) (analyzing preflight search under three rationales: expectation of privacy, consent, and general reasonableness).

This Comment does not propose a complete discussion on this topic. For a greater discussion on the tension between the general reasonableness construction and the warrant-preference construction, see generally DRESSLER, *supra*, at 183–92; Davies, *supra*. For the argument that a warrant-preference standard is required by the Fourth Amendment, see, for example, *Katz v. United States*, 389 U.S. 347 (1967); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1492–98 (1985); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994). For the opposing view, see, for example, *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Bradley, *supra*, at 1481–91.

In many ways, the Fourth Amendment is one of the most vague provisions in the Bill of Rights. The phrasing of the Fourth Amendment creates problems with its practical application because the Amendment does not give guidelines to determine which searches and seizures must be made pursuant to a warrant.⁸ The problem comes, in part, because the “warrant” clause of the Amendment is not directly tied to the “reasonable” clause. While the Fourth Amendment begins by stating, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”⁹ and ends by stating that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,”¹⁰ it never directly states that a warrant is a requirement for a reasonable governmental search and seizure.¹¹ Thus, because the Fourth Amendment prohibits “unreasonable searches and seizures”¹² and does not technically preclude “reasonable” searches made without a warrant,¹³ some scholars and judges have proposed that the constitutionality of searches and seizures should be determined according to a general “reasonableness” standard.¹⁴

However, such an approach is short-sighted in light of the purpose and history of the Fourth Amendment. The Amendment, like the other amendments comprising the Bill of Rights, is inherently tied to its history, and this history has been very important to the Supreme Court when interpreting the Amendment. Commenting on the Framers’ intentions when they penned the Fourth Amendment, the Supreme Court in *Chimel v. California* stated, “The [Fourth] Amendment was in large part a reaction to the

8. See U.S. CONST. amend. IV.

9. *Id.*

10. *Id.*

11. See 1 LAFAVE, *supra* note 1, § 1.1(a), at 8 & n.22.

12. *Id.*

13. See *Elkins v. United States*, 364 U.S. 206, 222 (1960) (“[W]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.”).

14. See, e.g., *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting); Amar, *supra* note 7, at 801–11; Bradley, *supra* note 7, at 1471.

general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.”¹⁵

The Supreme Court in *Boyd v. United States* specifically acknowledged the importance of the history leading to the adoption of the Fourth Amendment.¹⁶ The Court noted that in colonial times, it was the practice of the British to employ writs of assistance in their efforts to enforce taxation in their colonies.¹⁷ Writs enabled a revenue officer, acting solely within his discretion, to search for smuggled goods in suspected places.¹⁸ In February, 1761, in Boston, James Otis spoke out against this practice, calling it “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book” because it put “the liberty of every man in the hands of every petty officer.”¹⁹ Otis made his speech in Boston in February 1761, during a famous political debate that was perhaps the most effective event in creating support for the Revolutionary War.²⁰ John Adams later commented on Otis’s speech: “Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”²¹

In light of the Fourth Amendment’s history, it is small wonder that the Amendment includes stipulations against “unreasonable searches and seizures.”²² In addition to prohibiting unreasonableness, the Fourth Amendment has long been read to presume that reasonable searches be made pursuant to warrants,²³ “supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”²⁴ The

15. 395 U.S. 752, 761 (1969) (citations omitted). For a greater discussion on the history culminating in the adoption of the Fourth Amendment, see generally Davies, *supra* 7, at 547.

16. 116 U.S. 616, 625–27 (1886).

17. *Id.*

18. *Id.*

19. *Id.* (citations omitted) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 303 (Da Capo Press 1972) (1868)).

20. *Id.* at 625.

21. *Id.* (citations omitted).

22. U.S. CONST. amend. IV.

23. See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967); Bradley, *supra* note 7, at 1492–98; Maclin, *supra* note 7, at 20–21.

24. U.S. CONST. amend. IV.

Supreme Court in *Coolidge v. New Hampshire* summarized the foundation for this warrant-preference standard when it stated, “[T]he most basic constitutional rule in this area is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions.’”²⁵ These exceptions are “jealously and carefully drawn,”²⁶ and require “a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.”²⁷

The Supreme Court has recognized a number of exceptions to the Warrant Clause of the Fourth Amendment. Examples of such exceptions include searches made on United States borders,²⁸ stop-and-frisk searches by police officers,²⁹ searches made incident to arrest,³⁰ searches based on probable cause made in “hot pursuit” or exigent circumstances,³¹ “special needs” searches,³² sobriety checkpoint stops,³³ administrative searches,³⁴ and searches made with valid consent.³⁵ In addition, a warrantless search may be reasonable where the court determines an individual either does not have an actual or subjective expectation of privacy or that an individual’s subjective expectation of privacy is not one society is willing to accept as reasonable.³⁶

25. 403 U.S. 443, 454–55 (1971) (quoting *Katz*, 389 U.S. at 357).

26. *Id.* at 455 (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)).

27. *Id.* (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

28. *E.g.*, *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

29. *E.g.*, *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

30. *E.g.*, *Gustafson v. Florida*, 414 U.S. 260, 265 (1973); *United States v. Robinson*, 414 U.S. 218, 236 (1973).

31. *E.g.*, *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

32. *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987); *O’Connor v. Ortega*, 480 U.S. 709, 720 (plurality opinion) (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

33. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

34. *E.g.*, *See v. City of Seattle*, 387 U.S. 541, 545 (1967); *Camara v. Mun. Ct.*, 387 U.S. 523, 531–32, 538 (1967).

35. *E.g.*, *United States v. Drayton*, 536 U.S. 194, 200 (2002); *United States v. Mendenhall*, 446 U.S. 544, 558–60 (1980); *Schneekloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973).

36. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also* *O’Connor v. Ortega*, 480 U.S. 709, 725–26 (1987) (plurality opinion) (holding that in the context of work-related intrusions and “investigations of work-related misconduct[,]” government interests in proper and efficient workplace operations outweigh government employees’ privacy interests in their place of work); *Hudson v. Palmer*, 468 U.S. 517, 525–26

In review, the practical application of the language of the Fourth Amendment is not inherently clear because the Amendment does not explicitly designate warrantless searches as unreasonable. An approach that would reduce the Fourth Amendment to a reasonableness balancing test is short-sighted because the history of the Fourth Amendment indicates that the Amendment was adopted to prevent the government discretion that such a balancing approach would permit. However, the Supreme Court has allowed for the creation of carefully reasoned exceptions to the warrant requirement of the Fourth Amendment.

III. HOW EXCEPTIONS TO THE WARRANT CLAUSE IN THE FOURTH AMENDMENT HAVE BEEN MISAPPLIED IN ATTEMPTS TO INCLUDE PREFLIGHT PASSENGER SEARCHES

While United States courts have sought to justify preflight searches of passengers under the Fourth Amendment since the early 1970s,³⁷ the courts have never reached a single, unified justification for preflight passenger searches.³⁸ However, United States courts have attempted to apply certain widely accepted exceptions to the Warrant Clause in misguided attempts to justify preflight passenger searches.

Courts have used four widely accepted exceptions to the Warrant Clause in the Fourth Amendment to justify preflight passenger searches: the *Terry* stop-and-frisk exception, the consent exception,

(1984) (holding that prisoners have no reasonable expectation of privacy in their individual cells).

37. See, e.g., *United States v. Allen*, 349 F. Supp. 749, 754 (N.D. Cal. 1972).

38. See *United States v. Hartwell*, 436 F.3d 174, 176 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 111 (2006) (then-Judge Alito, writing for the Third Circuit, acknowledged that “courts have not settled on a single framework for analyzing warrantless searches at airport checkpoints”).

the *Katz* reasonable expectation of privacy exception, and the border search exception.³⁹ This Part will explain how these four exceptions

39. In addition to the four exceptions to the Warrant Clause of the Fourth Amendment that will be discussed below, some may attempt to analogize other recognized, but less applicable, exceptions (e.g. searches made incident to arrest, searches based on probable cause when in exigent circumstances, sobriety checkpoint stops, administrative searches, and “special needs” searches). These analogies are either facially improper or are based upon “exceptions” to the Warrant Clause of the Fourth Amendment which are really tacit applications of a general reasonableness standard that is incompatible with the Amendment’s warrant preference.

Searches made incident to arrest cannot be logically analogized to preflight passenger searches because in almost every preflight passenger search, no probable cause to arrest the passenger exists prior to the search. The “incident to arrest” exception requires, of course, probable cause to arrest. *See Gustafson v. Florida*, 414 U.S. 260, 265 (1973) (“It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody.”).

Searches based on probable cause made in “hot pursuit” or exigent circumstances cannot be logically analogized because in almost every preflight passenger search, no probable cause exists to suggest that a passenger possesses contraband materials prior to the search. In addition, truly exigent circumstances do not exist because officers are not in “hot pursuit” of the airline passengers they are searching. *See Warden v. Hayden*, 387 U.S. 294, 297–99 (1967) (holding a warrantless search of a house constitutional due to the “exigencies of the situation” and stating that “[s]peed . . . was essential” because the officers had probable cause to believe the suspect had committed an armed robbery and then entered the house less than five minutes before the search was made (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948))).

Sobriety checkpoint stops cannot be logically analogized to preflight passenger searches because while sobriety checkpoints involve suspicionless stopping, questioning, and observing motorists, actual searches are likely to be permitted only upon individualized suspicion. *See Mich. Dep’t State Police v. Sitz*, 496 U.S. 444, 450–51, 455 (1990) (holding that a suspicionless initial stop of motorists at a sobriety checkpoint and “the associated preliminary questioning and observation by checkpoint officers” does not violate the Fourth Amendment, but “[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard” (citation omitted)); *cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 34–42 (2000) (striking down program utilizing warrantless, suspicionless vehicle stops because the primary purpose of the program (drug interdiction) was insufficient to be excepted from “the general rule that a seizure must be accompanied by some measure of individualized suspicion”).

Some might argue that preflight passenger searches are justified under the administrative search exception to the Warrant Clause of the Fourth Amendment. In fact, the Supreme Court of the United States has, in dicta, spoken approvingly of preflight searches, justifying them under the administrative search doctrine. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674–75 (1989) (citing three preflight passenger search cases as “[a]pplying our precedents dealing with administrative searches”). The Court also spoke approvingly of preflight passenger searches in *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (“[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’—for example, searches now routine at airports and at entrances to courts and other official buildings.” (citing *Von Raab*, 489 U.S. at 674–76 & n.3)). *See also Hartwell*, 436 F.3d at 177–81; *United States v. Marquez*, 410 F.3d 612, 615–18 (9th Cir. 2005) (using administrative search balancing tests to justify preflight

came to be, how the courts have attempted to expand them so that they apply to preflight passenger searches, and why these attempts ultimately fail.

A. The Terry Stop-and-Frisk Search Exception

I. Terry v. Ohio

Terry v. Ohio lays out one set of circumstances in which a warrantless search of a person by a police officer may be reasonable.⁴⁰ In *Terry*, the defendant was convicted of illegally carrying a concealed weapon.⁴¹ Over Terry's objection, the government presented as evidence at trial a handgun seized from Terry by a police officer.⁴² The officer testified in a pretrial hearing that after he observed Terry behaving suspiciously, the officer believed that Terry might have been armed and was preparing to commit a crime.⁴³ The officer then approached Terry, identified himself as a police officer, and asked Terry for his name.⁴⁴ When Terry was not completely responsive, the officer grabbed him, spun him around, and patted down his outer clothing, finding the handgun.⁴⁵ The trial court

passenger searches). As stated in note 38, the Court has yet to adopt a unified rationale for the preflight searches, leading to opinions like *Shapiro v. State*, 390 So. 2d 344 (Fla. 1980), which reflect the uncertainty in this part of the law.

However, administrative (and "special needs") searches cannot be logically analogized to preflight passenger searches because administrative and "special needs" searches are effectively general reasonableness standards in the guise of "exceptions" to the Warrant Clause in the Fourth Amendment. See, e.g., *Camara*, 387 U.S. at 537 (holding that certain suspicionless administrative searches must only be "reasonable" in order to be constitutional, with "reasonableness" being determined by a balancing test in which "the [government's] need to search [is weighed] against the invasion which the search entails"). For a greater discussion on this topic, see generally Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295 (1992); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988); Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised To Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529 (1997). As discussed above, the history culminating in the Fourth Amendment demonstrates the importance of applying a warrant-preference standard—not a general reasonableness standard—to the Fourth Amendment.

40. 392 U.S. 1 (1968).

41. *Id.* at 4.

42. *Id.* at 4–5.

43. *Id.* at 6.

44. *Id.* at 6–7.

45. *Id.* at 7.

upheld the search and seizure, holding that the officer's experience and observations led to a belief that Terry was armed, and that in order to protect himself, the officer reasonably "stopped" Terry and "frisked" his outer clothing for weapons.⁴⁶

The Supreme Court upheld the district court's decision, holding that the search was reasonable under the Fourth Amendment and that the seized handgun was properly introduced as evidence.⁴⁷ The Court concluded that "in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances."⁴⁸ The Court reasoned that even "a limited search of outer clothing" might constitute "a severe, though brief, intrusion on cherished personal security."⁴⁹

In light of this background, the Supreme Court in *Terry* held that a search by a law enforcement official for weapons without probable cause for arrest is constitutional provided it is "strictly circumscribed by the exigencies which justify its initiation" and is limited to what is necessary to discover weapons that may harm the police officer or others nearby.⁵⁰ The Court reasoned that in order to determine the reasonableness of a warrantless search and seizure, it is necessary to balance the governmental interest or need of the search or seizure against the invasion entailed by the search or seizure.⁵¹ In justifying a particular intrusion, a police officer must "point to specific and articulable facts which, taken together with the rational inferences from those facts"⁵² and "in light of [the officer's] experience,"⁵³ would warrant that intrusion.⁵⁴ In addition, the facts must be judged by an objective "reasonable man" standard;⁵⁵ "simple 'good faith on the part of the arresting officer is not enough'"⁵⁶ because weight must not be given to an "inchoate and unparticularized suspicion or 'hunch.'"⁵⁷

46. *Id.* at 8.

47. *Id.* at 30-31.

48. *Id.* at 20.

49. *Id.* at 24.

50. *Id.* at 25-26.

51. *Id.* at 20-21.

52. *Id.* at 21.

53. *Id.* at 27.

54. *Id.* at 21.

55. *Id.* at 21, 38.

56. *Id.* at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

57. *Id.* at 27.

Thus, the Court in *Terry* held that a police officer having reasonable suspicion “to believe that he is dealing with an armed and dangerous individual” may, without a warrant, search that individual for weapons.⁵⁸ The officer must base his suspicion upon “specific reasonable inferences which he is entitled to draw from the facts in light of his experience” and not an “inchoate and unparticularized suspicion or ‘hunch.’”⁵⁹

2. The Terry stop-and-frisk exception applied to preflight passenger searches

One way courts have attempted to justify preflight passenger searches is by comparing the search of a metal detector to the *Terry* stop-and-frisk exception to the Warrant Clause in the Fourth Amendment.⁶⁰ In *United States v. Epperson*, the defendant was convicted of violating a federal statute because he was carrying a concealed weapon while trying to board an airplane.⁶¹ A United States Marshal found the weapon after Epperson passed through a magnetometer and the magnetometer gave an abnormally high reading.⁶² Epperson moved to exclude the gun as evidence in trial, arguing that the magnetometer scan was a “search” under the Fourth Amendment and that the search was unreasonable because it was made without a warrant and did not fall under one of the recognized exceptions to the warrant requirement.⁶³

The United States Court of Appeals for the Fourth Circuit found the magnetometer scan to be a “search” under the Fourth Amendment,⁶⁴ but held that the warrantless search was reasonable and did not violate Epperson’s Fourth Amendment rights.⁶⁵ The court concluded that while the reason for which the warrant

58. *Id.*

59. *Id.*

60. *United States v. Epperson*, 454 F.2d 769, 770 (4th Cir. 1972); *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971); *see also* *United States v. Davis*, 482 F.2d 893, 906 n.32 (9th Cir. 1973) (collecting airport search cases and stating that “[m]ost . . . have relied upon *Terry*’s stop-and-frisk rationale or general ‘reasonableness’ to uphold searches (including magnetometer scanning) of either the prospective passenger’s person or his carry-on luggage” (citations omitted)).

61. *Epperson*, 454 F.2d at 770.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See id.* at 772.

requirement was dispensed in the search of Epperson was not the same as the reason in the *Terry* case,⁶⁶ the magnetometer search was justified because it fell under the same recognized exception to the warrant clause as a *Terry* stop-and-frisk search.⁶⁷ The court noted that “[t]he rationale of *Terry* is not limited to protection of the investigating officer, but extends to ‘others . . . in danger,’”⁶⁸ and reasoned that the minimal invasion of Epperson’s personal privacy by a magnetometer was reasonable and fully justifiable in light of the government’s interest in discovering weapons and avoiding air piracy.⁶⁹

3. Why the Terry stop-and-frisk exception fails to justify preflight passenger searches

Even though the Supreme Court’s rationale in *Terry* might at first seem to apply to preflight passenger searches in that “[t]he rationale of *Terry* is not limited to protection of the investigating officer, but extends to ‘others . . . in danger,’”⁷⁰ the court in *Epperson* improperly compared a preflight magnetometer search to a *Terry* stop-and-frisk search. While the court did acknowledge that “the reason in *Terry* for dispensing with the ordinary warrant requirement is not the same as here,”⁷¹ the court should have also acknowledged that because the reasoning behind preflight magnetometer searches and *Terry* stop-and-frisk searches is different, the *Terry* stop-and-frisk exception to Fourth Amendment searches cannot, of itself, justify preflight magnetometer searches.

In *Terry*, even though the police officer did not have probable cause to stop and frisk Terry,⁷² he did observe Terry’s actions for some time⁷³ and, based on these observations, had formed a reasonable suspicion that Terry might endanger the officer or others.⁷⁴ Thus, the *Terry* exception is ultimately justified by both the need for the safety of police officers and others in danger and the

66. *Id.* at 770.

67. *Id.*

68. *Id.* at 772 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

69. *Id.* at 771.

70. *Id.* at 772 (quoting *Terry*, 392 U.S. at 30).

71. *Id.* at 770.

72. *See Terry*, 392 U.S. at 27–28.

73. *Id.* at 6.

74. *See id.*

defendant's observed actions that led to the officer's reasonable suspicion. In *Epperson*, however, the United States Marshal could not have observed Epperson's actions for any significant length of time before Epperson approached the magnetometer,⁷⁵ and could not have found in Epperson's individual actions a reasonable suspicion that Epperson might endanger the Marshal or others.⁷⁶ Thus, even though the magnetometer searches might indeed be conducted to protect the safety of United States Marshals and the general public, they cannot qualify under the *Terry* exception in the Fourth Amendment because the individuals searched do not always demonstrate observable actions that would lead to reasonable suspicion.⁷⁷

This is true even though at least one court has interpreted the language in *Terry* more broadly.⁷⁸ In *United States v. Lopez*, the district court for the Eastern District of New York interpreted *Terry* to instruct as follows:

A reviewing court must: (1) determine the objective evidence then available to the law enforcement officer and (2) decide what level of probability existed that the individual was armed and about to engage in dangerous conduct; it must then rule whether that level of probability justified the 'frisk' in light of (3) the manner in which the frisk was conducted as bearing on the resentment it might justifiably arouse in the person frisked (assuming he is not about to engage in criminal conduct) and the community and (4) the risk to the officer and the community of not disarming the individual at once.⁷⁹

This reading of *Terry* might suggest that *Terry* simply sets forth a test balancing the risk to the officer and the community against the level of intrusion of a proposed search. Applying this balancing test, if hijacking is assumed to be an extremely large risk to the public and if airport security searches (such as those provided by metal detectors) are considered to be minimally intrusive, then a preflight passenger search could be justified under *Terry* even if there is no individualized suspicion.

75. See *Epperson*, 454 F.2d at 770.

76. See *id.*

77. See *id.* at 771.

78. *United States v. Lopez*, 328 F. Supp. 1077, 1097 (E.D.N.Y. 1971).

79. *Id.*

However, such an interpretation of *Terry* is overly broad in light of the Supreme Court's conscientiously fact-bound holding in *Terry*:

*We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.*⁸⁰

Additionally, at least one other court has disagreed with the Fourth Circuit's application of the *Terry* exception in *Epperson* to preflight passenger searches. The Ninth Circuit has stated that preflight passenger searches are not justified under the *Terry* stop-and-frisk exception to the warrant requirement in the Fourth Amendment.⁸¹ In *United States v. Davis*, Davis was convicted of carrying a concealed weapon while attempting to board an airplane.⁸² An airline employee discovered the weapon in Davis's briefcase while performing a routine, suspicionless search of the carry-on luggage of passengers boarding the aircraft.⁸³ The court, while reversing and remanding the conviction on other grounds,⁸⁴ stated that routine, suspicionless preflight passenger searches present a wholly different problem than *Terry* searches.⁸⁵ The court quoted language from the Supreme Court reasoning that in a *Terry* stop-and-frisk search,

[t]he police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate[,] reasonable grounds for doing so. In the case of the self-protective search for weapons, he

80. *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (emphasis added).

81. *United States v. Davis*, 482 F.2d 893, 907-08 (9th Cir. 1973) ("*Terry* does not justify the wholesale 'frisking' of the general public in order to locate weapons and prevent future crimes.").

82. *Id.* at 895.

83. *Id.*

84. *Id.* at 915.

85. *Id.* at 906.

must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.⁸⁶

Therefore, the court held that the *Terry* decision was inapplicable to the case at hand because the airline employee making the search had no individual suspicion of Davis.⁸⁷

In sum, *Terry* searches fail to justify preflight passenger searches because the *Terry* search was created with the limited purpose of protecting police officers who reasonably and objectively suspected that an individual was about to act illegally in a manner that would endanger the officers or others nearby. Some courts have attempted to apply *Terry* searches to preflight passenger searches, but this analysis fails because preflight passenger searches are almost always made without reasonable and individualized suspicion, an essential requirement of *Terry* searches. In addition, this misapplied *Terry* exception conflicts with individual constitutional rights by setting a precedent in which the government can not only make warrantless searches without probable cause, but can also make warrantless searches without reasonable or individualized suspicion.

B. The Consent Exception

I. Schneckloth v. Bustamonte

The Supreme Court in *Schneckloth v. Bustamonte* outlined the consent exception: voluntary consent to a Fourth Amendment search or seizure can make a warrantless search or seizure reasonable.⁸⁸ In *Schneckloth*, Bustamonte was charged with the possession of a check with the intent to defraud.⁸⁹ A police officer pulled over a car in which Bustamonte and five others were riding for a minor traffic violation.⁹⁰ Because the driver did not have a driver's license and because only one of the six men had identification, the officer asked

86. *Id.* at 906 n.35 (citation omitted) (quoting *Sibron v. New York*, 392 U.S. 40, 64 (1968)).

87. *Id.* at 907 (“[The airline employee] had no individualized basis for the search at all, much less specific and articulable facts that would justify a reasonably prudent man in believing that [Davis] was about to commit a crime or that he was carrying a weapon.”).

88. 412 U.S. 218, 222 (1973).

89. *Id.* at 220.

90. *Id.*

the men to exit the car.⁹¹ The officer asked one of Bustamonte's companions, whose brother owned the car, if the officer could search the car.⁹² Bustamonte's companion agreed and even helped the officer search the car's trunk.⁹³ The officer found three checks, which had been stolen from a car wash, wadded up under the back seat.⁹⁴ At trial, Bustamonte moved to have the evidence suppressed, asserting that it was acquired through a search and seizure that violated his Fourth Amendment rights.⁹⁵

The Supreme Court in *Schneckloth* began its discussion by affirming that searches conducted pursuant to valid consent are constitutionally permissible, with the government bearing the burden to prove that the consent was "freely and voluntarily given."⁹⁶ The consent must be made free of coercion, "[f]or, no matter how subtly the coercion [is] applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."⁹⁷ However, the Court reasoned that even though the Fourth and Fourteenth Amendments limit the circumstances under which the government may conduct a search, a person's voluntary allowance of a search is not constitutionally suspect.⁹⁸ The Court indicated that the question of whether consent to a search is voluntary or is the product of express or implied coercion or duress is a question of fact that is determined by the totality of the circumstances.⁹⁹ In addition, the Court asserted that even though "knowledge of the right to refuse consent is one factor" to be considered, the government does not need to establish this knowledge as an indispensable element of effective consent.¹⁰⁰

91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at 219.

96. *Id.* at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

97. *Id.* at 228.

98. *Id.* at 242-43.

99. *Id.* at 227.

100. *Id.*

2. The consent exception applied to preflight passenger searches

The Supreme Court of Florida has applied the consent exception to a preflight passenger search.¹⁰¹ In *Shapiro v. State*, the defendant was convicted for possession of cocaine.¹⁰² The cocaine was discovered by a detective after Shapiro's suitcase went through an x-ray machine at an airport.¹⁰³ Shapiro moved to exclude the cocaine as evidence at trial, arguing that the government acquired the cocaine by a search and seizure in violation of his Fourth Amendment rights because the detective lacked sufficient probable cause when he searched Shapiro's suitcase.¹⁰⁴

The court held that in light of the totality of the circumstances, Shapiro voluntarily consented to the search of his suitcase,¹⁰⁵ reasoning that one exception to the probable cause requirement in the Fourth Amendment is a search that is conducted pursuant to free, unconstrained, and voluntary consent.¹⁰⁶ Citing *Schneckloth v. Bustamonte*, the court acknowledged that "while knowledge of the right to refuse consent is a factor to be taken into account, the government need not establish such knowledge as an indispensable requisite to effective consent."¹⁰⁷ The court found that Shapiro voluntarily consented to having his suitcase searched because he knew that he was required to submit to a security search upon entering the airport's boarding area.¹⁰⁸ In addition, the court found that Shapiro knew that he was not required to go through the security checkpoint, board the airplane, or carry his suitcase onto the plane.¹⁰⁹ Because Shapiro chose to go through the security checkpoint, board the airplane, and carry his suitcase onto the plane, he consented to the search of himself and his baggage.¹¹⁰

101. *Shapiro v. State*, 390 So. 2d 344 (Fla. 1980).

102. *Id.* at 346.

103. *Id.* at 347.

104. *Id.*

105. *Id.* at 348.

106. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Norman v. State*, 379 So. 2d 643 (Fla. 1980)).

107. *Id.* (citing *Schneckloth*, 412 U.S. at 241–42).

108. *Id.*

109. *Id.*

110. *Id.*

3. Why the consent exception fails to justify preflight passenger searches

The consent exception in the Fourth Amendment fails to justify preflight passenger searches because consent, particularly “implied” consent in the preflight search context, really just forces a person to choose between his or her Fourth Amendment rights and his or her constitutional right to travel.¹¹¹ The United States Court of Appeals for the Eighth Circuit discussed this issue in *United States v. Kroll*.¹¹² In *Kroll*, the defendant was charged with possession of a controlled substance.¹¹³ For some unstated reason, Kroll, while attempting to board an airplane, met the profile of a hijacker.¹¹⁴ As a result, a United States Marshal conducted a search of Kroll's attaché.¹¹⁵ This search resulted in the discovery of a small amount of amphetamine and a partially consumed marijuana cigarette, which was found in an ordinary white business envelope.¹¹⁶

Kroll moved to exclude the evidence at an evidentiary hearing; the government objected, arguing that the warrantless search was reasonable in part because Kroll consented to the search.¹¹⁷ The district court granted Kroll's motion to suppress the evidence, holding that although it was reasonable to search Kroll's attaché case for weapons and explosives,¹¹⁸ the envelope's contents were not reasonably inspected.¹¹⁹ The district court reasoned that while “as a general proposition . . . an inspection search of an airline passenger's carry-on luggage for the limited purpose of protecting lives and property from weapons and explosives is not unreasonable at its inception[,] . . . [t]his must not be interpreted, however, as license for the wholesale exploration of a passenger's luggage and its contents.”¹²⁰

111. See *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (“The word ‘travel’ is not found in the text of the Constitution. Yet the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.” (citing *United States v. Guest*, 383 U.S. 745, 757 (1966))); *Crandall v. Nevada*, 73 U.S. 35, 44 (1868).

112. 481 F.2d 884 (1973).

113. *Id.* at 885.

114. *Id.*

115. *Id.*

116. *Id.* at 885–86.

117. *Id.* at 886.

118. *United States v. Kroll (Kroll I)*, 351 F. Supp. 148, 152 (W.D. Mo. 1973), *aff'd*, 481 F.2d 884 (8th Cir. 1973).

119. *United States v. Kroll (Kroll II)*, 481 F.2d 884, 886 (8th Cir. 1973).

120. *Kroll I*, 351 F. Supp. at 152 (emphasis omitted).

In reviewing the district court's decision, the Eighth Circuit affirmed that the government had the burden of proving that "consent was, in fact, freely and voluntarily given."¹²¹ The government attempted to prove Kroll's consent by noting the warnings which were posted to advise passengers at the airport that they were subject to a search prior to boarding an aircraft.¹²² The government argued that "[w]here a person is clearly warned in advance that he will be searched and he still has time to withdraw as [Kroll] did here, his conduct in seeking to board the plane must be inferred to include a free, voluntary and intelligent consent to be searched."¹²³ The circuit court disagreed, and, upholding the district court's ruling to suppress the evidence, found that Kroll's actions did not constitute consent "in any meaningful sense."¹²⁴ The court reasoned that "[c]ompelling [Kroll] to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that [Kroll] freely and voluntarily consent[ed] to the search when to do otherwise would have meant foregoing the constitutional right to travel."¹²⁵ The court found unpersuasive the argument that Kroll would not have been actually deprived of his travel rights because alternative means to travel were available.¹²⁶ The court reasoned that "in many situations, flying may be the only practical means of transportation."¹²⁷

In sum, the consent exception in the Fourth Amendment was originally created for situations in which the person searched knowingly and voluntarily consents to the search by a distinct affirmative or implied action. At least one court has attempted to apply the consent exception to preflight passenger searches, but this analysis fails because persons subjected to preflight passenger searches do not truly consent through an affirmative or implied action, but are forced to consent in order to access their

121. *Kroll II*, 481 F.2d at 886 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 886 n.2.

127. *Id.* (quoting Patrick W. McGinley & Stephen F. Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 *FORDHAM L. REV.* 293, 322 (1972)).

constitutional right to travel.¹²⁸ In addition, this misapplied consent exception conflicts with individual constitutional rights by creating a precedent in which the government may use consent as a pretext for an unreasonable warrantless search or seizure in which no voluntary consent is truly given.

C. The Katz "Expectation of Privacy" Exception

I. Katz v. United States

The Supreme Court in *Katz v. United States* outlined how an individual's reasonable expectation of privacy affects Fourth Amendment searches and seizures.¹²⁹ In *Katz*, the defendant was convicted of transmitting gambling information by telephone in violation of a federal statute.¹³⁰ Over Katz's objection, the government was permitted to introduce evidence of his phone conversations at trial.¹³¹ The government gained the evidence from FBI agents who overheard Katz's telephone conversations on a public pay phone by attaching an electronic listening device to the outside of the phone booth.¹³² The appellate court affirmed the conviction, holding that the surveillance did not violate the Fourth Amendment because the agents did not physically enter the phone booth.¹³³

The Supreme Court reversed the conviction, holding that the government violated Katz's Fourth Amendment rights through an illegal search and seizure.¹³⁴ However, the Court refused to decide if a public telephone booth is a constitutionally protected area, finding:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what

128. Cf. *Airport Searches*, *supra* note 4, at 152 ("The Supreme Court has held, in other contexts, that the exercise of one constitutional right may not be conditioned on the waiver of another." (citing *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972))).

129. 389 U.S. 347 (1967).

130. *Id.* at 348.

131. *Id.*

132. *Id.*

133. *Id.* at 349 (quoting *Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966)).

134. *Id.* at 359.

he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.¹³⁵

The Court further held that Katz justifiably expected privacy while using the phone booth, so the government's eavesdropping comprised a search and seizure under the Fourth Amendment.¹³⁶ The Court reasoned that the fact that the listening device did not penetrate the phone booth's wall was not constitutionally significant because the Fourth Amendment extends to the recording of verbal statements, even if they are overheard without a technical trespass.¹³⁷

Finally, Justice Harlan introduced a privacy test in his concurrence which is still referenced today.¹³⁸ According to Justice Harlan's reading of prior Supreme Court decisions, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"¹³⁹ Justice Harlan used a person's home as an example of a place where an individual may have a reasonable expectation of privacy, but stated that objects, statements, or activities a person exposes in plain view of others are not protected by a reasonable expectation of privacy.¹⁴⁰

135. *Id.* at 351–52 (citations omitted).

136. *Id.* at 353.

137. *Id.*

138. *Id.* at 361 (Harlan, J., concurring); *see, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 33 (2001) ("As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned—unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.'" (citations omitted)); *United States v. Titemore*, 437 F.3d 251, 256 (2d Cir. 2006) ("The 'reasonable expectation of privacy' test, as articulated in Justice Harlan's concurrence, was adopted by a majority of the Court a little over a decade later." (citing *Smith v. Maryland*, 442 U.S. 735, 740–41 (1979))); *State v. Gonzalez*, 898 A.2d 149, 155 & n.11 (Conn. 2006) ("Although the term 'reasonable expectation of privacy' originated in Justice Harlan's concurring opinion in *Katz v. United States* . . . , it has since gained widespread acceptance in both state and federal jurisprudence." (citations omitted)).

139. *Katz*, 389 U.S. at 361.

140. *Id.*

2. *The Katz privacy test applied to preflight passenger searches*

The Supreme Court of Florida has applied the *Katz* privacy test to preflight passenger searches.¹⁴¹ In *Shapiro v. State*, discussed above, the Florida Supreme Court upheld Shapiro's conviction for possession of cocaine.¹⁴² As an alternative¹⁴³ to its rationale that Shapiro had consented to the preflight search, the court stated that for Shapiro to demonstrate that his Fourth Amendment rights had been violated, he would need to show that he had a reasonable expectation of privacy and that society recognized that expectation as reasonable.¹⁴⁴ The court held that Shapiro failed to show that he had a reasonable expectation of privacy because his own testimony showed that he had boarded planes many times and that he knew that his carry-on luggage must be inspected at a designated checkpoint in every airport.¹⁴⁵ Additionally, the court held that even if Shapiro had an expectation of privacy, society would not recognize that expectation as reasonable.¹⁴⁶ The court reasoned that "[a]t this point in time when airplane hijacking is at a crisis level, such an expectation, to be free from the limited intrusion brought about by the screening process utilized in the boarding area of the airports, is not justifiable under the circumstances."¹⁴⁷ The court further reasoned that a person who enters an airport boarding area is given notice by signs posted in boarding areas and should know that he or she is subject to a search for weapons or other materials that could be used to hijack an airplane.¹⁴⁸

3. *Why the Katz privacy test fails to justify preflight passenger searches*

The *Katz* privacy test—in which the court is forced to determine whether an individual has an expectation of privacy and whether

141. *Shapiro v. State*, 390 So. 2d 344 (Fla. 1980).

142. *Id.* at 346.

143. The *Shapiro* court offered three rationales that purportedly justified the search: that the defendant had no reasonable expectation of privacy in his carry-on baggage, *id.* at 347–48; that the defendant consented to the search, *id.* at 348; and that the government's interest in searching the defendant's suitcase justified the "minimal" intrusion under a general reasonableness approach, *id.* at 348–50.

144. *Id.* at 347 (additional citations omitted) (citing *Katz*, 389 U.S. 347).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 347–48.

society deems that “reasonable”¹⁴⁹—fails to justify preflight passenger searches because, as Justice Harlan himself later stated in *United States v. White*, “[o]ur expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.”¹⁵⁰ Thus, an individual’s expectation of privacy might not be “individual” or “subjective” at all—it might be an expectation forced upon him or her or shaped by the government through the passage of laws.¹⁵¹

A prime example of this is the Supreme Court of Florida’s decision in *Shapiro*.¹⁵² The court held that Shapiro did not exhibit an expectation of privacy because “he was aware that there is a checkpoint at every airport where carry-on baggage must be submitted for inspection.”¹⁵³ The Ninth Circuit’s decision in *United States v. Davis* provides another example.¹⁵⁴ The court stated that, “as a matter of constitutional law, a prospective passenger has a choice: he may submit to a search of his person and immediate possessions as a condition to boarding; or he may turn around and leave.”¹⁵⁵ Neither of these decisions leaves room for any kind of individual subjective expectation, but rather projects the government’s demand for diminished privacy in certain contexts onto the individual.

In addition, the *Katz* privacy test has fallen out of favor with at least a few courts because it does not adequately represent Fourth Amendment protections.¹⁵⁶ The Supreme Court in *Smith v.*

149. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

150. 401 U.S. 745, 786 (1971).

151. As one scholar stated, under the *Katz* expectation test, “the government could diminish each person’s subjective expectation of privacy merely by announcing half-hourly on television that . . . we were all forthwith being placed under comprehensive electronic surveillance.” Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

152. 390 So. 2d 344 (Fla. 1980).

153. *Id.* at 347.

154. 482 F.2d 893, 913 (9th Cir. 1973).

155. *Id.*

156. *See id.* at 905 n.30 (“Justice Harlan’s first condition would not appear to be universally applicable. The traditional protection afforded to the home under the Fourth Amendment could not be denied to a particular homeowner because he mistakenly supposed that government agents might enter whenever they pleased.”). In addition, the Supreme Court has concluded that the second prong of the *Katz* test (that the expectation of privacy be one society is prepared to recognize as reasonable) is much more important than the first (that there is an actual subjective expectation of privacy). *See, e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 525 n.7 (1984); *Oliver v. United States*, 466 U.S. 170, 177 (1984) (stating that the Fourth

Maryland lists an example where the two-part *Katz* privacy test might fall short of Fourth Amendment standards: “For example, if the government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects.”¹⁵⁷ Such a situation would be improper because the warrantless entry of personal homes without probable cause violates the very protection of privacy premised by the Fourth Amendment.¹⁵⁸ Concerning preflight passenger searches, under the reasoning of *Smith v. Maryland*, the Ninth Circuit in *Davis* also inadequately represented Fourth Amendment protections when it held that passengers have the constitutional choice to either submit to searches or leave.¹⁵⁹

In sum, the *Katz* privacy test was originally created in light of the notion that the Fourth Amendment protects an individual’s reasonable expectations of privacy.¹⁶⁰ At least one court has attempted to expand the *Katz* privacy test by improperly applying it to preflight passenger searches, but this analysis fails because the court denies the possibility that an individual might have a subjective, individual expectation of privacy at an airport and instead projects onto that individual an expectation of privacy that has been created through government practice.¹⁶¹ In addition, the improper application and expansion of the *Katz* privacy test conflicts with individual constitutional rights by creating a precedent in which the government can justify unreasonable warrantless searches and seizures by simply declaring that, in certain circumstances, a searched individual does not have an expectation of privacy.

Amendment does not protect the merely subjective expectation of privacy, but only those “expectation[s] that society is prepared to recognize as ‘reasonable’” (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967))).

157. *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979).

158. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” (emphasis added)).

159. *Davis*, 482 F.2d at 913.

160. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

161. *Shapiro v. State*, 390 So. 2d 344 (Fla. 1980).

*D. The Border Search Exception to the Fourth Amendment**I. United States v. Ramsey*

The Supreme Court in *United States v. Ramsey* outlined the longstanding right of the United States to protect itself by carrying out border searches.¹⁶² In *Ramsey*, the defendants were convicted of narcotics offenses.¹⁶³ After customs officials gained “reasonable cause to suspect” a violation of certain customs statutes, they opened and inspected, without a search warrant, incoming international mail meant for the defendants and discovered narcotics.¹⁶⁴ Against the defendants’ objection, the government admitted the narcotics as evidence at trial, and the defendants were found guilty.¹⁶⁵

The Supreme Court upheld the conviction, holding that the customs officer’s warrantless search was reasonable under the Fourth Amendment.¹⁶⁶ The Court commented that it should not require an extended demonstration to show that “searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable”¹⁶⁷ The Court reasoned that the same Congress that proposed the Fourth Amendment also enacted the first customs statute, which gave customs officers “full power and authority” to search vessels which they suspected were concealing goods subject to duties.¹⁶⁸ The court distinguished this “plenary customs power” from searches of “any particular dwelling-house, store, building, or other place” where a search warrant based upon probable cause was required.¹⁶⁹ The Court further reasoned that, even before the Fourth Amendment was adopted, border searches have been considered reasonable and have never needed the additional requirement of reasonableness or the existence of

162. 431 U.S. 606 (1977).

163. *United States v. Ramsey*, 538 F.2d 415, 416 (D.C. Cir. 1976), *rev’d*, 431 U.S. 606 (1977).

164. 431 U.S. at 607, 610.

165. *See id.* at 610–11.

166. *Id.* at 615–16.

167. *Id.* at 616.

168. *Id.* (internal quotation marks omitted) (quoting Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29).

169. *Id.* (quoting Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29).

probable cause to be constitutional because of the sole fact that the individual or article in question has entered the country from the outside.¹⁷⁰ “This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless ‘reasonable’ has a history as old as the Fourth Amendment itself.”¹⁷¹

2. The border search exception applied to preflight passenger searches

In *United States v. Nates*, the Ninth Circuit expressly held that the border search exception, which generally is applied only to searches of persons *entering* the United States, also applies to persons *exiting* the United States.¹⁷² In that case, Nates was convicted of attempting to smuggle over \$100,000 onto an international flight departing for Colombia in violation of a currency reporting law.¹⁷³ While making a general baggage search, a United States customs agent selected two of Nates’s bags for inspection to determine if Nates was attempting to take large amounts of unreported currency from the country.¹⁷⁴ The agent “selected Nates’ two bags for inspection because they were new (one still b[ore] a price tag), had no passenger name tag, and were unusually heavy.”¹⁷⁵ Nates moved to suppress the evidence procured by the search, and argued on appeal that it was acquired by an unconstitutional search.¹⁷⁶

In determining the constitutionality of the currency reporting law, the Ninth Circuit began its analysis by noting, “The border search exception to the fourth amendment, which allows a search to be initiated without a warrant, probable cause or articulable suspicion, applies to exit searches.”¹⁷⁷ The court noted that the rule applying the border search exception to a search of a person exiting a

170. *Id.* at 619.

171. *Id.*

172. 831 F.2d 860, 862 (1987). For further discussion of the so-called “reverse” border exception, see STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 451–52 (7th ed. West 2004) (citing *United States v. Berisha*, 925 F.2d 791 (5th Cir. 1991); *Nates*, 831 F.2d at 863 (Kozinski, J., dissenting); *United States v. Duncan*, 693 F.2d 971 (9th Cir. 1982)).

173. *Nates*, 831 F.2d at 861.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 862 (citations ommitted).

United States border has been criticized, but not overruled.¹⁷⁸ However, the court then specifically stated, “This circuit holds that a suspicionless exit border search is constitutional.”¹⁷⁹ Based upon this analysis, the Ninth Circuit determined that the currency reporting law, requiring reasonable cause for suspicion, was constitutional.¹⁸⁰

In *United States v. Skipwith*, the Fifth Circuit has held that passengers presenting themselves to board airliners can be searched according to border search standards—“mere or unsupported suspicion.”¹⁸¹ In that case, Skipwith was convicted of drug possession after a preflight passenger search revealed he was carrying cocaine.¹⁸² A deputy United States marshal made a warrantless search of Skipwith because he matched the Federal Aviation Administration anti-skyjack profile, claimed not to have identification, appeared to be very nervous, and may have been under the influence of drugs or alcohol.¹⁸³ Skipwith moved to suppress the evidence procured by the search at trial, arguing it was acquired by an unconstitutional search.¹⁸⁴

The Fifth Circuit began its analysis by noting that, in light of the widespread publicity of the government’s efforts to avoid aircraft piracy, Skipwith should have known he was subject to a preflight search once he attempted to board a plane.¹⁸⁵ The court also noted, “Necessity alone, however, whether produced by danger or otherwise, does not in itself make all non-probable-cause searches reasonable.”¹⁸⁶ To calculate the reasonableness of preflight passenger searches, the court outlined three factors to be considered: “public necessity, efficacy of the search, and degree of intrusion.”¹⁸⁷ The court determined, “Our conclusion, after this tripartite weighing of the relevant factors, is that the standards for initiating a search of a person at the boarding gate should be no more stringent than those

178. *Id.* (citing *United States v. Duncan*, 693 F.2d 971, 983–94 (9th Cir. 1982) (Fletcher, J., dissenting); *United States v. Des Jardins*, 747 F.2d 499, 503–04 (9th Cir. 1984), *vacated in part*, 772 F.2d 578 (9th Cir. 1985)).

179. *Id.*

180. *Id.*

181. 482 F.2d 1272, 1276 (1973).

182. *Id.* at 1273.

183. *Id.* at 1273–74.

184. *Id.* at 1273.

185. *Id.* at 1273–74.

186. *Id.* at 1275.

187. *Id.*

applied in border crossing situations.”¹⁸⁸ The court held that “those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country, are subject to a search based on mere or unsupported suspicion.”¹⁸⁹ The court also stated that reasonableness does not limit officers to searching only passengers who match a certain profile or who appear nervous or suspicious.¹⁹⁰

3. Why the border search exception fails to justify preflight passenger searches

In light of the holdings in *Nates*¹⁹¹ and *Skipwith*,¹⁹² the temptation naturally appears to apply the border search exception to preflight passenger searches of all departing flights—both international and domestic. While it is not disputed that the border search exception in the Fourth Amendment applies to passengers of international flights entering the United States, the border search exception cannot be rationally stretched to justify all preflight passenger searches conducted at airports. The border search exception applies to arriving international flights because the airports at which international flights arrive become “functional equivalent[s]” of the border.”¹⁹³ Thus, searches of an arriving international traveler are reasonable because it can be shown by more than just probable cause or reasonable suspicion that the traveler crossed a United States border.¹⁹⁴ However, the vast majority of flights departing or arriving in United States airports do not cross international borders. Consequently, the border search exception in the Fourth Amendment cannot apply to purely domestic flights.

Even more than the sovereign right of the United States to protect itself,¹⁹⁵ the essence of the “border search” exception is “the single fact that the person or item in question had entered into [the

188. *Id.* at 1276.

189. *Id.*

190. *Id.*

191. 831 F.2d 860, 862 (1987).

192. 482 F.2d 1272, 1276 (1973).

193. *See* United States v. Duncan, 693 F.2d 971, 977 (9th Cir. 1982); United States v. Niver, 689 F.2d 520, 525–26 (5th Cir. 1982) (stating that an airport may act as the “functional equivalent of the border”).

194. *See* Niver, 689 F.2d at 526.

195. United States v. Ramsey, 431 U.S. 606, 616 (1977).

United States] from outside.”¹⁹⁶ Thus, while the border search exception may be justified at a border or its functional equivalent by this “single fact” alone,¹⁹⁷ the exception cannot apply when a border crossing into this country is not reasonably certain.¹⁹⁸ In *United States v. Ramsey*, discussed above, the United States Supreme Court addressed this issue. The Court reasoned as follows:

Travellers [sic] may be . . . stopped [without a warrant and without suspicion] in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.¹⁹⁹

In sum, the border search exception in the Fourth Amendment was originally created because of the right of the United States, as a sovereign nation, to protect itself by searching those that seek to enter its borders. Some courts have analogized the border search exception to preflight passenger searches occurring at airports that act as functional equivalents to borders,²⁰⁰ but the border search exception cannot be expanded to justify preflight searches of passengers embarking on purely domestic flights. Such an improper application of the border search exception would conflict with individual constitutional rights by creating a precedent in which the government may conduct a warrantless search or seizure for reasons inconsistent with those originally justifying the border search exception.

In review, United States courts have expanded four “traditional” exceptions to the Warrant Clause in the Fourth Amendment by unnaturally applying them to preflight passenger searches. These misapplied exceptions include the *Terry* stop-and-frisk exception,²⁰¹

196. *Id.* at 619.

197. *Id.*

198. *See Niver*, 689 F.2d at 526.

199. *Ramsey*, 431 U.S. at 618 (emphasis omitted) (quoting *Carroll v. United States*, 267 U.S. 132, 153–54 (1925)).

200. *See United States v. Duncan*, 693 F.2d 971, 977 (9th Cir. 1982); *Niver*, 689 F.2d at 525–26.

201. *See supra* Part III.A.

the consent exception,²⁰² the *Katz* expectation of privacy exception,²⁰³ and the border search exception.²⁰⁴ However, the application of any of these four exceptions to preflight searches is ultimately not justified. Preflight searches do not qualify as *Terry* stop-and-frisk searches because they are usually made without individualized suspicion; the searches cannot be authorized by consent because the air traveler has no realistic choice but to submit; the searches do not fall under the *Katz* privacy test because the government should not tell its citizens what their reasonable expectation of privacy should be (a problem with the *Katz* test generally); and the searches do not qualify under the border exception because most preflight passenger searches are not made at any United States border or functional equivalent. Additionally, misapplied exceptions in the Fourth Amendment conflict with individual constitutional rights by creating precedents in which the government may make unreasonable warrantless searches and seizures.

IV. A NEW APPROACH TO CONSTITUTIONALLY JUSTIFYING PREFLIGHT PASSENGER SEARCHES UNDER THE FOURTH AMENDMENT

As this Comment shows, preflight searches cannot be logically justified under the current exceptions to the Warrant Clause in the Fourth Amendment. Consequently, this Part calls upon the Supreme Court to create a *sui generis* exception to the warrant requirement in the Fourth Amendment in order to constitutionally justify preflight passenger searches.

Even though warrantless preflight passenger searches do not neatly fit into any of the long-established and accepted categories of warrantless searches considered reasonable under the Fourth Amendment, in light of the September 11, 2001 terrorist attacks, most people would likely believe it undesirable to allow all airline passengers to forego security screening.²⁰⁵ Chief Judge Friendly, in

202. See *supra* Part III.B.

203. See *supra* Part III.C.

204. See *supra* Part III.D.

205. See, e.g., Marilyn Adams, *Most Flyers Accept Intrusion in the Name of Security*, USA TODAY, Sept. 6, 2006, http://www.usatoday.com/money/biztravel/2006-09-06-accepting-intrusions_x.htm (reporting Gallup Poll data that 70% of those polled “say none of the security measures used in airports should be stopped”).

his concurring remarks in *United States v. Bell*, stated, “When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness.”²⁰⁶ However, general public awareness and approval of preflight passenger searches do not, of themselves, provide legal justification for the searches. As Justice Powell of the Supreme Court reminded us in *United States v. United States District Court*, “[g]iven the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.”²⁰⁷

Consequently, the Supreme Court should grant certiorari to a preflight passenger search case²⁰⁸ and create a sui generis exception to the Warrant Clause in the Fourth Amendment, based upon the longstanding need to create greater rationality and unity in this area of Fourth Amendment jurisprudence.²⁰⁹ This exception would only apply to mass transportation systems accessible to the public, where security screening for weapons is necessary because the danger of terrorism is abnormally great.

The Supreme Court should consider the inherent physical characteristics of public mass transportation when crafting the boundaries of this new exception. Identifying these characteristics will assist the Court in determining which forms of mass transportation accessible to the public should be covered by the proposed exception.²¹⁰ In addition, specifically tying the physical characteristics of public mass transportation systems to the parameters of the exception will make the exception less likely to be misapplied in non-mass transportation situations. Currently, airlines, passenger trains, subways, buses, and possibly automobile taxis are the principal forms of mass public transportation employed in the United States.

206. 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, C.J., concurring) (emphasis omitted).

207. 407 U.S. 297, 314 (1972).

208. The uncertainty in this area of the law remains timely, as evidenced by the recent case of *United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 111 (2006); *see supra* note 38. The Court had the opportunity to resolve the unsettled law in preflight passenger searches by granting certiorari, but declined to do so.

209. *See Amar, supra* note 7, at 758 (describing Fourth Amendment jurisprudence as “a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse”).

210. The Court would, of course, be well-advised to consider data gathered by experts in making these determinations in order to best create a narrowly tailored exception.

One inherent characteristic of some forms of public mass transportation is a substantial likelihood of considerable loss of human life in the event of a terrorist attack. Factors such as the passenger carrying capacity of each type of public mass transportation vehicle, the speeds available to and maneuverability of the vehicle, and the capacity of the vehicle itself to be used as weapon will be important in determining the potential loss of human life in a terrorist attack.²¹¹

A second inherent characteristic of mass transportation systems available to the public concerns the degree of difficulty the government would encounter in an attempt to stop a hijacking before the transportation vehicle is utilized as a terrorist weapon. The question becomes, at exactly what point is the last clear chance to prevent the destruction of life and property that would result from a terrorist attack carried out on a particular form of transportation?²¹² When the last clear chance to avoid such destruction occurs prior to the departure of the public transportation vehicle, the difficulty in stopping a terrorist attack occurring after departure may be so great as to become a practical impossibility.²¹³ Thus, in modes of transportation where the last clear chance to prevent mass

211. In formulating the exception, it may be useful to the Court to consider the number of lives lost as a result of the most historically destructive terrorist attacks involving particular forms of transportation. *See, e.g., U.S. Deaths in Iraq, War on Terror Surpass 9/11 Toll*, CNN.com, Sept. 3 2006, <http://edition.cnn.com/2006/WORLD/meast/09/03/death.toll/> (stating the 9/11 toll as 2973, "including Americans and foreign nationals but excluding the terrorists"); Associated Press, *Madrid Bomb Death Toll Lowered to 190*, MSNBC.com, Mar. 23, 2004, <http://www.msnbc.msn.com/id/4502950/> (190 deaths reported from March 11, 2004 bombing of commuter train in Madrid).

212. In tort law, society has recognized the significance of a party's last clear chance to prevent damage to life and property. *See* BLACK'S LAW DICTIONARY 897-98 (8th ed. 2004).

213. Reflecting the practical difficulty a government would experience in an attempt to halt hijacked aircraft, some nations, such as Poland and Germany, have passed statutes permitting the military to shoot down hijacked aircraft as a last resort. BBC NEWS, *Poland To Down Hijacked Aircraft*, Jan. 13, 2005, <http://news.bbc.co.uk/2/hi/europe/4172487.stm>; *see also* United States v. Marquez, 410 F.3d 612, 616 (9th Cir. 2005) ("Little can be done to balk the malefactor after [weapons or explosives are] successfully smuggled aboard." (alteration in original) (quoting United States v. Davis, 482 F.2d 893, 910 (9th Cir.1973))). In contrast, law enforcement officials have been able to stop hijacked busses on several occasions. *See, e.g.,* Richard Cowen & Justo Bautista, *Police Arrest 7 in Jitney Hijacking*, RECORD (Bergen County, N.J.), Nov. 3, 2006, at L.01 (hijacked jitney bus stopped after police vehicle blocked its path); *Man Arrested After 70-Mile Bus Hijacking in San Diego*, L.A. TIMES, Feb. 8, 1997, at 17 (hijacked bus rolled to stop soon after running over spike-strip laid by police). *But see Bus Hijacker Killed After Chase Covers 320 Miles of Desert*, N.Y. TIMES, Jan. 31, 1992, at A15 (spikes set by police cause several flat tires on hijacked bus but fail to stop bus).

destruction to life and property occurs prior to the departure of the vehicle, warrantless searches of boarding passengers would be more justified than in modes of transportation where an attack commenced after the departure of the vehicle would be more easily thwarted.

A third inherent characteristic of public mass transportation concerns the substantial likelihood that a terrorist attack will have a crippling effect on the public mass transit system and associated public infrastructure. Depending upon the type of transportation vehicle involved in the terrorist attack and the extent of potential damage to property, widespread paralyzation of certain public mass transportation systems may occur.²¹⁴

However, the Supreme Court should consider more than just the inherent physical characteristics of public mass transportation when crafting the boundaries of this new exception—the Court should consider further guidelines to ensure the exception is at least somewhat resistant to misapplication. That is, the Court should strive to create an exception that is narrowly tailored to prevent it from being applied in situations where such a search would not be justified.

One guideline that would facilitate the narrow tailoring of the exception is that it should be applicable, by its terms, to a specific and limited factual context. The factual situation covered by the exception should involve only that where passengers present themselves to board certain mass transportation systems available to the public that are especially vulnerable to terrorist attacks. The exception should be further tailored to a specific purpose—which, in this case, would be to search for items that potentially can be used to carry out a terrorist attack.

A second guideline that would facilitate the narrow tailoring of the proposed exception is that the searches authorized by it would

214. See WILLIAM C. THOMPSON, JR., COMPTROLLER OF THE CITY OF NEW YORK, ONE YEAR LATER, THE FISCAL IMPACT OF 9/11 ON NEW YORK CITY 2 (2002), *available at* <http://comptroller.nyc.gov/bureaus/bud/reports/impact-9-11-year-later.pdf> (estimating, as a result of the 9/11 attacks, a \$4.3 billion loss in infrastructure—including trains, telephone service, and electricity—to New York City); NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 292, 326 (2004), *available at* <http://www.9-11commission.gov/report/911Report.pdf> (noting the closing of subway stations and major thoroughfares on 9/11 and that “[f]or the first time in history, all nonemergency civilian aircraft in the United States were grounded, stranding tens of thousands of passengers across the country”).

be permitted to be only as intrusive as necessary to attain the government's stated purpose (detecting terrorist weapons).²¹⁵ The exception should also take into account advances in technology, such that the intrusive nature of the search may decrease or increase depending on advances in technology by terrorists and/or the government.²¹⁶

A third guideline that will facilitate the narrow tailoring of the proposed exception is that the new exception should fit as seamlessly as possible within current search and seizure practice and jurisprudence under the Fourth Amendment. In making this assessment, the Court should give deference, as it did in *Ramsey*, to searches that have been a longstanding historical practice.²¹⁷ An exception that does not dramatically alter the status quo is preferable because it will not disturb other, possibly long-upheld, legal principles.

Presently, applying the above guidelines would seem to dictate that the proposed *sui generis* exception should be confined to preflight passenger searches at airports. Indeed, preflight passenger searches have existed for decades. Additionally, if limited to preflight passenger searches for objects potentially used to carry out a terrorist attack, the proposed exception would also comport with the guideline that the proposed exception be narrowly tailored. Thus, the exception would ensure that searches necessary to public safety are not applied to situations where they are not justified.

Concluding that the proposed exception would apply only to preflight passenger searches also comports with accepted societal practice, as expressed by Justice Souter in *United States v. Drayton*:

215. The requirement that searches and stops be tailored to their stated purpose is not foreign to Fourth Amendment jurisprudence. *See, e.g.*, *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (police automobile checkpoint stop "appropriately tailored" to fit need to seek information from public about "hit and run" that occurred about one week before); *Terry v. Ohio*, 392 U.S. 1, 19 (1968) ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." (citations omitted)).

216. *See, e.g.*, Jon Hilkevitch, *Airline is Adding to Cockpit Security*, CHI. TRIB., Sept. 1, 2004, at 13, available at <http://www.chicagotribune.com/technology/chi-0409010159sep01,1,6776422.story?coll=chi-techtopheds-hed> (describing bulletproof, FAA-approved steel barriers installed in United Airlines aircraft "that can be quickly fastened across front aisles of planes to protect pilots from attacks when the cockpit door is opened during flight").

217. *See supra* notes 162–71 and accompanying text (discussing the Court's deference to the longstanding practice of border searches).

Anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand. The commonplace precautions of air travel have not, thus far, been justified for ground transportation . . . and no such conditions have been placed on passengers getting on trains or buses.²¹⁸

However, while the proposed exception is narrowly tailored to avoid misapplication, expressly incorporating the inherent characteristics of public mass transportation into the exception allows for the possibility that changes in technology or other circumstances might qualify other forms of mass public transportation for the exception outlined here. As other forms meet the proper requirements, they naturally will bring themselves *into* the exception, rather than forcing the exception to *expand* to include them. Thus, the exception will have the safeguards of a narrowly tailored construction while remaining open to the possibility of future change.

Finally, justifying preflight passenger searches through the creation of a *sui generis* exception would promote logical consistency in Fourth Amendment jurisprudence. Ideally, the *Terry* stop-and-frisk search will again only be applied to police officers who observe suspicious activity, the consent exception will again only be applied to truly voluntary actions, the *Katz* privacy analysis may again determine the existence of privacy expectations rather than projecting governmental expectations of privacy on the public, and the border search exception will again only be applied at borders or their true functional equivalents.

Most importantly, as exceptions in the Fourth Amendment return to their rational foundations, the warrant requirement and judicial review may be sustained in their proper role in the Amendment. Ideally, Fourth Amendment interpretation will reach the day when, in the words of James Madison, “independent tribunals of justice . . . will be naturally led to resist every

218. 536 U.S. 194, 208 (2002) (Souter, J., dissenting). *But see generally* Keeley, *supra* note 4 (considering which Fourth Amendment exception(s) may justify suspicionless searches of passengers boarding subways).

encroachment upon rights expressly stipulated for in the Constitution”²¹⁹

In review, the prevailing constitutional approach attempts to misapply certain widely accepted exceptions to the warrant clause in the Fourth Amendment in an effort to justify preflight searches of passengers boarding airliners. A more effective and protective constitutional approach would be to create a *sui generis* exception to the Warrant Clause in the Fourth Amendment which is narrowly tailored to ensure that searches necessary to public safety are not misapplied to other situations in conflict with individual constitutional rights.

V. CONCLUSION

Individual constitutional rights make up the heart of liberty in the United States. While the United States must support efforts to detect and deter terrorism in this modern era, such efforts must not be made at the expense of these liberties.

This Comment shows that the history culminating in the Fourth Amendment demonstrates the importance of judicial review of searches by law enforcement officials—and consequently a warrant-preference standard—in the Amendment. In light of this requirement, courts have attempted to analogize accepted Fourth Amendment exceptions to preflight passenger searches through the *Terry* stop-and-frisk exception, the consent exception, the *Katz* reasonable expectation of privacy exception, and the border search exception.²²⁰ However, this Comment also shows that these unnatural applications are improper because they fail to provide a logical constitutional foundation for preflight passenger searches.

Therefore, the Supreme Court should create a *sui generis* exception to the warrant clause in the Fourth Amendment that is narrowly tailored to ensure that searches truly necessary to public safety are not misapplied to other situations in which government intrusion into personal security is not justified. Thus, all exceptions to the warrant clause in the Fourth Amendment, including the proposed exception, would be made only in proper factual

219. *Mapp v. Ohio*, 367 U.S. 643, 647 (1961) (quoting 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1834)).

220. *See supra* Part III.

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circumstances and would be conscientiously limited to provide the least possible intrusion on individual constitutional rights.

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